

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**CAZANOVE OPICI WINE GROUP d/b/a  
OPICI FAMILY DISTRIBUTING OF  
NEW YORK**

**Employer**

**and**

**Case No. 29-RC-270372**

**UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 2D**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

United Food and Commercial Workers, Local 2D (Petitioner) filed a representation petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit of 47 Sales Representatives employed by Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York (Employer) in the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, and Westchester. The Employer contends that the petitioned-for unit is not appropriate and that the only appropriate unit must include, in addition to the petitioned-for unit, approximately 27 Sales Representatives employed in the remaining counties of New York State. The Petitioner maintains that the petitioned-for unit is an appropriate unit but would be willing to represent a unit, if found appropriate, that includes all approximately 74 Sales Representatives in the State of New York. Both parties agree that a mail ballot election is appropriate.

A hearing officer of the Board held a hearing in this matter by videoconference and the parties submitted post-hearing briefs arguing their respective positions. The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I am directing a mail ballot election in the petitioned-for unit.

**I. THE EMPLOYER’S OPERATIONS**

**A. DEPARTMENTAL ORGANIZATION & SUPERVISION**

The Employer engages in the nonretail sale of wine and spirits to businesses that sell the product for off-premises consumption, such as liquor stores, as well as businesses that sell the product for on-premises consumption, such as restaurants. The Employer sells wine and spirits in New York State under the name “Opici Family Distributing.” Other corporate entities doing

business under the same name engage in the nonretail sale of wine and spirits in various other markets, including in Connecticut, Delaware, Florida, Maryland, New Jersey, and the District of Columbia.

In New York, the Employer began its operations as early as 1947 in New York City and expanded over the years to include the outer boroughs and the Counties of Westchester, Nassau, Suffolk, Orange, and Rockland. The Employer serviced areas as far north as Putnam and Dutchess Counties, but around 2000, eliminated those two counties. The Employer did not conduct business throughout the entire State of New York until approximately 2008, when it expanded to include the upstate counties. The expansion included hiring a number of sales representatives and managers, setting up a distribution network, and opening a warehouse.

Beginning with the expansion in 2008, the Employer maintained two separate divisions within the State of New York. First, the Metro New York division (MNY or Metro) is coterminous with the petitioned-for counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, and Westchester. Second, the Upstate New York division (UNY or Upstate) includes the remaining upstate counties of New York. Until recently, the divisions were supervised separately, with John Gregory serving as Vice President of Sales in MNY and Mike Proch serving as Vice President of Sales in UNY.

In August 2019, the Employer announced its intention to begin implementing changes to its organizational structure:

As of September 4, 2019, we will be taking the current two division structure that exists in New York and transitioning to a more centralized management of both our route to market and vendor relations.

The “initial plans for reorganization” included hiring Steven Hutchinson into a newly created role of “Director of Sales for NY,” with the responsibility of overseeing “the entire sales force and management team of both Metro and Upstate.” Additionally, the Employer announced that John Gregory would be moving into a new role and Mike Proch would be retiring. The organizational chart currently in effect shows that Hutchinson’s title is actually Executive Vice President, with Josh Muska filling the subordinate Director of Sales position. The chart shows no distinct MNY and UNY divisions.

The two divisions continue to exist in regard to the Employer’s public appearance and its internal operations.

The Employer’s public website routes users to one of the following seven markets for bill paying purposes: New Jersey, Metro New York, Upstate New York, Florida, Maryland, Connecticut, or Washington DC. The website became available in March 2018, and testimony establishes that the separate portals for the seven markets continued to appear on the website at least as recently as one week before the hearing. Additionally, the business cards that the Employer provides to its Sales Representatives identify the division in which they are employed, at least for Metro New York Representatives.

Internally, the Employer continues to recognize the MNY and UNY divisions. For example, the Employer maintains separate quota requirements and separate incentive programs for each division. Additionally, there is a MNY price book and a UNY price book, and Sales Representatives must sell product out of the appropriate price book depending on the customer's location. The Employer maintains separate email groups consisting of MNY Sales Representatives and UNY Sales Representatives, and uses them to communicate with employees.

Finally, while the Employer has eliminated the separate MNY and UNY lines of reporting in its upper management, Sales Representatives in New York are organized into nine local teams of 7-10 employees, each of which is led by a Manager. Just as the Employer communicates with MNY Sales Representatives and UNY Sales Representatives using separate email groups, it also uses separate email groups to communicate with the six MNY Managers counties and three UNY Managers. Above all the Managers on the Employer's organizational chart is Muska, who in turn reports to Hutchinson.

Managers are responsible for the day-to-day supervision of the Sales Representatives, including communicating quota requirements and incentive goals, handling Representatives' requests to adjust their quota requirements, and handling Representatives' requests for changes to their compensation, including their draw and commission rate. Managers regularly hold meetings for all Sales Representatives in their region and speak to individual Sales Representatives on a daily basis. The Employer provides each Manager with an expense account, which they can use to support Sales Representatives in their sales activity, such as for entertaining clients.

#### B. SKILLS AND TRAINING

Throughout the state, all Sales Representatives attend the same orientation program and complete the same trainings. All Sales Representative positions in the state share one job description and the same basic qualifications, including five years' experience in the industry, a "WSET [Wine & Spirit Education Trust] Level 2" certification, excellent interpersonal and communication skills, and more.

#### C. JOB FUNCTIONS

Throughout the state, all Sales Representatives perform the same types of functions, including calling on (i.e. physically going to) existing sales accounts with retailers and restaurateurs to sell wine and spirits. Sales Representatives must "own the relationships in their assigned accounts," including making sure product is delivered on time and making sure bills are paid. Sales Representatives bring samples to clients, conduct in-person tastings for consumers, solicit new item placements, distribute point-of-sale merchandise, and more. All Sales Representatives are expected to fulfill quotas, which are sixty-day sales objectives for certain products.

Whereas the general duties of a Sales Representative are uniform throughout the state, the actual work performed by each Sales Representative depends upon their geographical assignment. For example, MNY Sales Representatives working in Manager Maria Heaney's region generally call on accounts located within the five boroughs of New York City. Except for certain

circumstances, such as where a Sales Representative has received a referral based upon an existing relationship,<sup>1</sup> Sales Representatives' work is confined to their geographical region. Thus, MNY Sales Representatives generally do not service accounts in UNY locations, and UNY Sales Representatives generally do not service accounts in MNY locations.

In addition to assigning employees to different geographical regions, the Employer requires MNY Sales Representatives to sell different products than UNY Sales Representatives by imposing two different sets of quotas. For any sixty-day quota period, a given product may appear on one list of quotas but not the other. There is substantial overlap but the quotas are not identical. According to the Employer's summary of its 142 quotas in 2020, 124 (87%) applied to both MNY and UNY Sales Representatives. The quotas are not optional. Rather, "quotas are the job," and if Sales Representatives do not meet minimum quota requirements, they do not qualify to earn incentive pay.

#### D. FUNCTIONAL INTEGRATION & FREQUENCY OF CONTACT

Sales Representatives perform the vast majority of their work in the field and, consequently, have very little contact with one another. They work independently and are generally not aware of their coworkers' accounts. Sales Representatives do not report to an office regularly but are required to attend one of two annual trade shows: MNY Sales Representatives attend a trade show located in Manhattan and UNY Sales Representatives attend a trade show located in Albany.<sup>2</sup>

In addition to the annual trade shows, Sales Representatives attend approximately one to two sales meetings per month. Historically, the Employer has conducted separate sales meetings for MNY Sales Representatives and UNY Sales Representatives. Since the onset of the COVID-19 pandemic in 2020, the Employer has conducted all sales meetings virtually on a statewide basis. John Gregory, Director of Portfolio Management, testified that he had discussed the possibility of conducting statewide meetings as a part of the Employer's plan to transition away from the two-division structure, but statewide virtual meetings did not take place until the onset of the pandemic. Some parts of those virtual meetings were separated by division; for example, UNY Sales Representatives were excused from discussions pertaining to a product available only to MNY Sales Representatives.

Before the COVID-19 pandemic, statewide meetings for all New York Sales Representatives were rare. Sales Representative Bonnie Novak recalled "a couple," and "less than five," statewide meetings in her 33 years working for the Employer.

The record shows a degree of integration among the Employer's warehouse facilities (the Glen Rock, New Jersey facility; Syracuse, New York facility; and a third-party depot in Albany, New York), from which product is delivered to customers. Certain products that are only stored at the Glen Rock facility are available to customers upstate by special orders, which are fulfilled

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<sup>1</sup> The Employer introduced into evidence a chart showing that nine MNY Sales Representatives service 21 UNY accounts, and two UNY Sales Representatives service three MNY accounts.

<sup>2</sup> The trade shows were not held in 2020, apparently, due to the COVID-19 pandemic.

by transfer trucks that travel upstate three to four times per week. Sales Representatives are generally not involved in the warehousing or delivery of product; they deliver “one percent at most” of the product to customers.

#### E. INTERCHANGE

There is no evidence of interchange between the MNY and UNY Sales Representatives. The record shows no instances of MNY Sales Representatives transferring to the UNY division, or vice versa, on either a temporary or permanent basis. Approximately eleven Sales Representatives service some accounts outside their division, but those employees have not transferred. They continue to report to a Manager in a region within their division, continue to adhere to their own division’s quotas and incentive programs, and continue to attend meetings for their own division.

One MNY Sales Representative, Bonnie Novak, testified that she considered transferring to the UNY division in anticipation of the Employer’s expansion in or around 2008. She had previously serviced accounts in Dutchess and Putnam Counties, but lost those accounts when the Employer eliminated those counties in or around 2000. When Ms. Novak learned of the Employer’s expansion to include upstate counties, she asked to service those accounts again. She learned that, in order to service accounts in Dutchess and Putnam Counties, she would have to surrender her accounts in the MNY division and transfer to the UNY division. She decided that transferring would not be in her best interest.

#### F. TERMS AND CONDITIONS OF EMPLOYMENT

Sales Representatives across the state have largely the same terms and conditions of employment with some exceptions. All Sales Representatives are subject to the same employee handbook administered by a single human resources department, which also oversees Opici Family Distributing employees in other states.

One exception to the generally similar terms and conditions of employment is the travel compensation policy. MNY Sales Representatives receive a flat amount of money monthly for travel whether their territory covers Westchester, Long Island, or boroughs of New York City. UNY Sales Representatives receive travel compensation in an amount that varies depending on their territory.

Another exception is vacation time. The Employer’s Glen Rock, New Jersey facility, from which MNY Sales Representatives’ orders are filled, shuts down for one week every January and August. Because MNY Sales Representatives would not be able to fill orders during those weeks, they consistently plan their vacation time at that time. The Employer’s upstate warehouse facilities do not adhere to a regular shutdown schedule.

Finally, a number of factors influencing compensation differ between MNY and UNY. As noted above, MNY and UNY Sales Representatives must fill different sales quotas, qualify for different incentive programs, and sell product out of different price books, although there is substantial overlap between the two groups. Because Sales Representatives are paid by

commission, their sales directly impact their compensation. Commission rates also impact compensation. MNY and UNY Sales Representatives are subject to the same commission rates: 6.5% for off-premises wine, 4% for off-premises spirits, 7% for on-premises wine, and 5% for on-premises spirits. While the absolute rates are the same, variance in the types of accounts serviced by the two divisions causes variance in the effective rates that are paid to Sales Representatives. MNY Sales Representatives derive a much higher proportion of their revenue from on-premises accounts, 36%, than UNY Sales Representatives, who only derive 15% from on-premises accounts. As a result, MNY Sales Representatives earn the higher commission rates on a larger proportion of their sales.

#### G. BARGAINING HISTORY

There is no evidence that the Employer and the Petitioner have had any collective-bargaining relationship pertaining to the petitioned-for unit, and no evidence that the Employer has entered into any collective-bargaining agreement covering those employees.

The Employer has met with an organization called the Metro Sales Club, which negotiates on behalf of MNY Sales Representatives, beginning no later than October 2020. The Metro Sales Club holds elections to choose officers and holds membership meetings. At the time of the hearing, the Metro Sales Club had existed for at least three years, and three MNY Sales Representatives held elected office in the organization. The Metro Sales Club has bylaws. The Employer deducts \$10 per month from each MNY Sales Representative's paycheck and remits those funds to the Metro Sales Club's bank account. UNY Sales Representatives do not pay dues and do not participate in the Metro Sales Club.

The Metro Sales Club collects MNY Sales Representatives' concerns related to working conditions and seeks to address those concerns by communicating them to the Employer and asking for certain changes. The club has asked for different commission rates than UNY Sales Representatives. It has sought to ease quota requirements. It has asked for other work requirements, such as mandates pertaining to the "GreatVines" tool (a customer relations management platform), to be reduced or eliminated in order to address safety concerns. The Employer has responded to those proposals, including by easing certain quota requirements and investigating updates to the GreatVines tool.

## II. BOARD LAW AND ANALYSIS

In examining the appropriateness of a petitioned-for bargaining unit, the Board "consider[s] only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining." *Overnite Transp. Co.*, 322 NLRB 723, 723 (1996). When a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board applies its traditional community-of-interest factors to "determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017).

The Board has historically considered the following factors under its traditional

community-of-interest test:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

Additionally, in determining appropriate bargaining units, the Board has also long given substantial weight to prior bargaining history. *The Boeing Co.*, 368 NLRB No. 67, slip op. at 3 (Sept. 9, 2019) (“*Boeing*”).

In *Boeing*, the Board clarified that *PCC Structurals* contemplates a three-step process for deciding whether a bargaining unit is appropriate under the Board's traditional community-of-interest test:

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved. *Id.*

I address each of those three steps in turn.

#### A. THE PROPOSED UNIT SHARES AN INTERNAL COMMUNITY OF INTEREST

The first step of the *PCC Structurals* analysis requires “identify[ing] shared interests among members of the petitioned-for unit.” *Id.* The proposed unit of MNY Sales Representatives shares a number of interests that form an internal community of interest. MNY Sales Representatives all perform the same function, selling wine and liquor to businesses for on-premises and off-premises consumption, which requires a uniform set of qualifications and skills. They share a single job classification, meaning that the type of work they perform overlaps completely with one another. There is no evidence of any other job classification overlapping with their function. Although MNY Sales Representatives perform their function in separately grouped geographical regions, all of those regions are contained within a single distinct metropolitan area. All MNY Sales Representatives share the same terms and conditions of employment. While they do not contact one another on a daily basis, they do come into contact at regular meetings.

The Employer asserts that “the petitioned-for unit does not exactly satisfy Step 1” because “[t]heir selling areas differ by individual, they have a different customer mix by individual, and they have different Regional Managers.” Br. 22-23. The differences among individual Sales Representatives' selling areas and customer mixes, however, are inevitable. If they all serviced the same counties or “the same accounts,” Br. 23, they would be redundant. Moreover, the cited differences between individual MNY Sales Representatives do not show that they lack sufficient shared interests. If that were the case, none of the individual MNY Sales Representatives would

share a community of interest with any other Sales Representative, and their Section 7 rights would effectively be extinguished.

Additionally, while it is true that groups of MNY Sales Representatives are separately supervised on a day-to-day basis by the Manager of their region, they all share common supervision by a middle manager, Director of Sales Josh Muska, who reports to Executive Vice President Steven Hutchinson. Thus, a single chain of authority controls the MNY Sales Representative's conditions of employment, and those conditions can be addressed in a unified manner, as demonstrated by the Employer's discussions with the Metro Sales Club.

Based on the record as a whole, I find that MNY Sales Representatives share sufficient interests that form an internal community of interest.

**B. MNY SALES REPRESENTATIVES SHARE A COMMUNITY OF INTEREST SUFFICIENTLY  
DISTINCT FROM THE INTERESTS OF EMPLOYEES EXCLUDED FROM THE UNIT**

The second step of the *PCC Structural*s analysis requires "a comparative analysis of excluded and included employees ... [that] consider[s] whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id.* at 4 (quotation and emphasis omitted). Taken as a whole, the record evidence demonstrates that the interests of the excluded UNY Sales Representatives are meaningfully distinct and outweigh similarities with the interests of the petitioned-for MNY Sales Representatives.

To be sure, the excluded UNY Sales Representatives, which the Employer seeks to include in the unit, share some similar interests with the petitioned-for MNY Sales Representatives. For instance, under the organizational chart currently in effect, all Sales Representatives throughout the state are grouped into the same administrative division and share the same upper level management. Additionally, all Sales Representatives must possess the same skills to perform the same essential function, i.e., selling wine and spirits. Finally, MNY and UNY Sales Representatives are subject to many of the same terms and conditions of employment, including generally applicable commission rates.

However, those facts alone do not encompass the two groups' distinct interests in the context of collective bargaining, and therefore are not determinative of the scope of the unit. It is important to note that the actual work performed by MNY and UNY Sales Representatives is confined to separate geographical areas, with only relatively rare examples of overlap where employees have accepted referrals from outside their normal sales area. The differences in the New York City metropolitan area and the remaining upstate New York counties, where the work is performed, create meaningful differences in terms and conditions of employment for the two groups of employees.

One difference between the MNY and UNY areas is the density of customers and the expense incurred by travelling among them, as Sales Representatives must do on a daily basis. That difference is reflected in the different forms of travel compensation that the Employer provides to MNY and UNY Sales Representatives, and would form the basis for different (and



perhaps opposing) collective bargaining interests between the two groups.

Another difference between the MNY and UNY areas is the markets to which Sales Representatives must sell. The record shows that a far greater proportion of MNY Sales Representatives' revenue comes from on-premises customers as compared to UNY Sales Representatives, who earn more of their revenue from off-premises customers. Given that the Employer pays different commission rates for on-premises and off-premises sales, MNY and UNY Sales Representatives would again have different (and perhaps opposing) interests in regard to which commission rate they would exert their bargaining power to increase. That difference is not speculative, as the Metro Sales Club has actually sought to establish separate commission rates for MNY Sales Representatives.

A third difference between the MNY and UNY areas is the set of products that Sales Representatives are able to sell, required to sell, and incentivized to sell. Those differences are reflected in the separate price books, separate quotas, and separate incentive programs that the Employer maintains for MNY and UNY Sales Representatives. While there is substantial overlap in those sets of products, the Employer's focus on superficial similarities is overly simplistic. For example, although the majority of products that appear in the MNY price book appear in the UNY price book, and vice versa, that does not mean that those products are equally accessible in the two divisions. The record establishes that some products in the UNY price book are subject to delivery delays because they must be transferred from the New Jersey warehouse, which can lead to a lost sale.

Similarly, when both MNY and UNY Sales Representatives must fulfill an identical quota on the same product, that can impose a different burden rooted in differences in tastes between the markets (e.g. wines grown in upstate counties are more popular in the UNY market). The same can be said for incentive programs. Additionally, the record shows that even when an identical product appears in incentive programs for both MNY and UNY Sales Representatives, oftentimes the amount that must be sold to qualify for the incentive varies. Thus, despite the apparent similarities between products sold by MNY and UNY Sales Representatives, a closer look reveals significant differences that have a real impact on employees' compensation. The groups of Sales Representatives clearly have distinct interests in bargaining over which products they are able to sell, required to sell, and incentivized to sell.

In addition to the key differences in working conditions caused by the distinct geographical areas in which Sales Representatives work, the lack of functional integration supports finding meaningfully distinct interests between the two groups. Compared to the high degree of functional integration in *Boeing*, where 178 petitioned-for employees worked among a group of 2700 employees on a production line all working toward producing a single product, here, Sales Representatives work independently and without any awareness of their coworkers' accounts. See 368 NLRB No. 67, slip op. at 5. The MNY and UNY Sales Representatives are in no way functionally integrated.

The Employer's reliance on *Budget Rent A Car Sys., Inc.*, 337 NLRB 884, 885 (2002), is unavailing. In that case, the Board found the two petitioned-for single facility units of customer service coordinators and service agents (and in one store, mechanics) to be inappropriate because

the stores were functionally integrated into a group of five stores. *Id.* There, all five stores drew inventory from a single fleet of rental cars, which required employees to communicate multiple times per day, and also relied upon mechanics based solely out of one of the stores. By contrast, the petitioned-for MNY Sales Representatives do not rely upon, coordinate with, or communicate frequently with UNY Sales Representatives, or vice versa. Although the MNY and UNY Sales Representatives perform similar work and have occasional contact with one another at meetings, they are not functionally integrated. The somewhat integrated operation of the Employer's warehouses does not change that fact because the functions of the Sales Representatives are entirely separate from the warehouses' inventory and delivery functions, in contrast with the employees in *Budget Rent A Car*, whose duties required them to perform or coordinate inventory and delivery functions. In any event, MNY and UNY Sales Representatives do not share a single inventory in the same way as the employees in *Budget Rent A Car*; the evidence shows that MNY Sales Representatives plan their vacations around the New Jersey warehouse's shutdown periods, which indicates that their sales are highly dependent on a subset of inventory housed in a single warehouse.

In addition to the lack of functional integration, the lack of interchange and contact between MNY and UNY Sales Representatives supports finding meaningfully distinct interests between the two groups. The record is devoid of any evidence showing either permanent or temporary transfers from one group to the other. The extent of contact between the two groups is similarly limited. MNY and UNY Sales Representatives have historically attended separate sales meetings, but since the onset of the COVID-19 pandemic, they have attended joint online sales meetings via online platforms such as Zoom. Even during those meetings, portions of the meetings are reserved for MNY Sales Representatives only. If the practice of online joint meetings were to continue, which is speculative at this point, the overwhelming majority of Sales Representatives' working time would continue to be spent working independently. That minimal level of contact does not support a conclusion that the groups share interests in the context of collective bargaining.

Finally, bargaining history must be considered. "Fundamentally in Board representation law, it is well known that long-established bargaining relationships, evidenced by successive contracts ... will not be disturbed where they are not repugnant to the Act's policies." *Fraser & Johnston Co.*, 189 NLRB 142, 151 fn. 50 (1971). Here, there is neither evidence of the Employer having any bargaining relationship with the Petitioner relating to the petitioned-for unit, nor any evidence of the Employer entering into any collective bargaining agreement covering the petitioned-for unit. Thus, there is no existing bargaining relationship to be disturbed.

At the same time, there is a relatively short-lived history of the Employer meeting with the Metro Sales Club to address the grievances of MNY Sales Representatives. The Metro Sales Club is not a certified bargaining representative, but I find that it meets the definition of a labor organization because it is an organization "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5). While I do not give this bargaining history the "substantial weight" given to full-fledged collective bargaining resulting in a collective-bargaining agreement, the practice of MNY Sales Representatives banding together in a labor organization, and the Employer repeatedly meeting

with that organization and responding to their grievances, can only support the distinct collective bargaining interests of the MNY group. *See Boeing*, 368 NLRB No. 67, slip op. at 2.

Based on the record as a whole, Board precedent supports finding that the interests of the excluded UNY Sales Representatives are meaningfully distinct and outweigh similarities with the interests of the petitioned-for MNY Sales Representatives. In *Buitoni Foods Corp.*, the Board considered the appropriateness of a unit of approximately 35 nonretail food salesmen “working in the New York metropolitan area, including New York City, Long Island, Westchester County, and Northern New Jersey down to Perth Amboy.” 111 NLRB No. 108 (1955). The employer contended that the only appropriate unit would also include about 15 salesmen working in Philadelphia, Connecticut, New England, Florida, and California.” *Id.* Even though the employer’s “operations [were] centralized to an extremely high degree,” and all salesmen shared similar working conditions, vacations and compensation, the petitioned-for unit was found to be appropriate because, *inter alia*, the employer “distinguish[ed] between its so-called ‘metropolitan area salesmen’ and ‘out of town area salesmen’ by dividing them into separate groups for purposes of competing for performance awards, attending sales meetings, assigning sales numbers, and disseminating information dealing with sales problems in their particular areas.” *Id.*

Here, the facts are striking similar. Even though the Employer has centralized much of its upper level supervision and administration, and Sales Representatives across New York State share many generally applicable working conditions, the Employer distinguishes between the MNY and UNY groups for purposes of incentivizing the sale of certain products, identifying products that must be sold to fulfill quotas, conducting meetings, and communications. In combination with the distinct metropolitan area in which the MNY Sales Representatives conceive and cultivate business relationships, the distinctions made by the Employer recognize, and contribute to, a community of interest among the MNY Sales Representatives that is sufficiently distinct from the UNY Sales Representatives that the Employer seeks to include in the unit. *See also Gerber Prod. Co.*, 172 NLRB 1698, 1699 (1968) (finding petitioned-for unit of salesmen in one of six contiguous territories within employer’s Pittsburgh district to have distinct community of interest from other territories); *Anheuser-Busch, Inc.*, 110 NLRB 194, 196 (1954) (finding petitioned-for unit of beer salesmen in four New York metropolitan branches to have distinct community of interest from other branches within the employer’s region).

C. THE BOARD HAS NOT ESTABLISHED INDUSTRY-SPECIFIC GUIDELINES RELEVANT TO THE BARGAINING UNIT

The third step of the *PCC Structural*s analysis “includes, where applicable, consideration of guidelines that the Board has established for specific industries with regard to appropriate unit configurations.” *Boeing*, 368 NLRB No. 67, slip op. at 4. Both the Employer and the Petitioner concede that the Board has not established any industry-specific guidelines that would be relevant to the bargaining unit here. Indeed, no relevant guidelines exist.

D. THE PETITIONED-FOR UNIT WOULD NEITHER VIOLATE SECTION 9(c)(5) NOR INAPPROPRIATELY FRACTURE THE EMPLOYER’S NEW YORK SALES FORCE

The Employer contends that directing an election in the petitioned-for unit would run afoul

of Section 9(c)(5) of the Act and inappropriately fracture the Employer's grouping of Sales Representatives in New York State. Both arguments are unavailing.

Directing an election in the petitioned-for unit does not violate Section 9(c)(5) because the analysis herein does not treat the extent to which the employees have organized as controlling. Rather, as explained at length above, the community-of-interest factors compel a finding that the petitioned-for unit is appropriate. Moreover, that conclusion does not risk fracturing the Employer's grouping of Sales Representatives in New York State. Rather, the petitioned-for unit aligns with distinctions between MNY and UNY Sales Representatives that the Employer continues to make, despite making changes such as revising its organizational chart and consolidating some of its upper management.

The Employer's comparison to *Bergdorf Goodman* is unavailing. 361 NLRB 50 (2014).<sup>3</sup> Unlike here, the petition in that case pieced together two departments—a part of one combined with the entirety of another—which were located in areas on different floors and directly supervised by different floor managers. *See id.* at 52. Here, the petition comports with an aspect of the Employer's operations based upon meaningful distinctions that the Employer makes between MNY and UNY Sales Representatives. Even if it did not, the Board in *Bergdorf Goodman* noted that “[t]he petition's departure from any aspect of the [e]mployer's organizational structure might be mitigated or outweighed by other community-of-interest factors” that are present here, such as common supervision and shared skills and training. *Id.* at 52, 53 n.5. Just as the extent to which employees have organized is not controlling, neither is the Employer's organizational chart. The weight of the community-of-interest factors compel a finding that the petitioned-for unit is appropriate.

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The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998); NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (the determination over the method of election is not an issue subject to litigation).

The Board generally has a strong preference for conducting manual elections. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2; *San Diego Gas & Electric*, 325 NLRB 1143 (1998). However, it also has a long history of conducting elections by mail when necessary. As the Board noted in *London's Farm Dairy, Inc.*, 323 NLRB 1057 (1997), “[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail.” There are well-established procedures for conducting effective mail-ballot elections set forth in the Board's *Casehandling Manual (Part Two)*,

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<sup>3</sup> I note that, in the case relied upon by the Employer, the Board applied a standard for determining an appropriate bargaining unit that has now been overruled. *See PCC Structural, Inc.*, 365 NLRB No. 160 (overruling *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011)).

*Representation Proceedings*, at Section 11336, et seq. The parties agree, and I find that a mail ballot election is appropriate.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: Any and All Sales Representatives working in the New York State Counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk and Westchester, including all employees in those counties who call on sales accounts, cover daily customer routes, take weekly inventory of company items, conduct sales presentations, take sales orders, cultivate relationships with retail customers and their employees both onsite and remotely and submit and place orders on behalf of customers.

Excluded: Any and all other employees working in the New York State Counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk and Westchester, including but not limited to, all supervisors, managers, Human Resources, clerical, quality control, IT professionals, owners, and any other employees not specifically described in the "Included" unit titles.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by UFCW Local 2D, United Food and Commercial Workers International Union.

#### **A. Election Details**

The election will be conducted by United States mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the National Labor

Relations Board, Region 29, on **April 19, 2021**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by the close of business on **May 17, 2021**. However, ballots received in signed envelopes prior to the count will be included in the count. The mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact **Kareema Alston** via telephone at **718-765-6180** or via e-mail at **Kareema.Alston@nlrb.gov** by no later than 5:00 p.m. on **April 29, 2021** in order to arrange for another mail ballot kit to be sent to that employee.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **March 27, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 31, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a

file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 29, 2021



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